IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

BLICKMAN TURKUS, L.P., dba BT COMMERCIAL REAL ESTATE,

Plaintiff

v.

EGREETINGS NETWORK, INC., et al.,

Defendants.
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No. C 05-1091 MJJ

ORDER DENYING DEFENDANTS' SUMMARY JUDGMENT MOTION

INTRODUCTION

Before the Court is Egreetings Network, Inc. ("EGN") and American Greetings Corporation's ("AGC") (collectively "Defendants") motion for partial summary judgment ("Motion"). Defendants seek dismissal of the first two causes of action for breach of contract and common count. For the following reasons, the Court **DENIES** Defendants' Motion.

FACTUAL BACKGROUND

On or about April 13, 1999, EGN and the owners ("Landlord") of a commercial office building located at 149 Montgomery Street in San Francisco entered into a 10-year commercial lease pertaining to certain portions of the building ("Master Lease"). In October 1999 and March 2000, the Landlord and EGN amended the Master Lease to add more space to the leased premises. The Master Lease permitted EGN to sublet part or all of the premises with consent of the Landlord.

On or about March 19, 2001, EGN and Plaintiff entered into an Exclusive Subleasing Agreement ("Subleasing Agreement"), which granted Plaintiff the exclusive right to procure for EGN subleases for leased premises. The Subleasing Agreement had an original expiration date of October 1, 2001.

In October 2001, the parties entered into an Extension of the Exclusive Subleasing Agreement, which changed the expiration date of the Subleasing Agreement to March 31, 2002. On or about April 18, 2002, the parties signed a second Extension of the Subleasing Agreement, which moved the expiration date to December 31, 2002. This extension also amended paragraph 6 regarding commissions and the Schedule of Sublease Commissions. In December 2002, EGN and Plaintiff signed a final Extension of the Subleasing Agreement ("Final Extension"), which changed the expiration date to September 30, 2003. The Final Extension also amended paragraph 6 regarding commissions and the Schedule of Sublease Commissions.

In March 2003, Plaintiff presented and EGN accepted a sublease proposal for Howard S. Wright Construction Company. On or about July 31 and August 7, 2003, Plaintiff received sublease proposals from two cooperating brokers, but EGN did not enter into either proposed sublease arrangement. Shortly thereafter, on September 30, 2003, the Subleasing Arrangement expired on its own terms.

In the fall of 2003, a lease dispute arose between EGN and the Landlord under the Master Lease. On or about November 19, 2003, the Landlord's counsel specifically stated in writing that the Landlord had not elected to terminate the Master Lease or EGN's right to possession of the lease premises. As a result of the ongoing lease dispute, the Landlord filed an action against EGN in San Francisco County Superior Court on December 19, 2003. During the litigation of that matter, Defendants contend that the Landlord adamantly refused to terminate the Master Lease and would not accept possession of the leased premises unless and until the parties reached a settlement. Both parties agree that at no time did Defendants receive an abandonment notice regarding the Master Lease and leased premises from the Landlord. The parties also agree that at no time did Defendants receive a written acceptance of any surrender of the leased premises from the Landlord. In August 2004, EGN and the Landlord settled the lease dispute and the state court action. As part of the

settlement, and for the first time during the life of the Master Lease, the Landlord took possession of the leased premises.

On February 10, 2005, Plaintiff filed a complaint for breach of contract, common count, and fraud against Defendants in San Mateo County Superior Court. On March 16, 2005, Defendants removed the matter to federal court based on diversity jurisdiction. Defendants now move for partial summary judgment on the first and second causes of action for breach of contract and common count.

LEGAL STANDARD

The summary judgment procedure is a method for promptly disposing of actions. *See* FED. R. CIV. PROC. 56. The judgment sought will be granted if "there is no genuine issue as to any material fact and [ ] the moving party is entitled to judgment as a matter of law." FED. R. CIV. PROC. 56(c). "[A] moving party without the ultimate burden of persuasion at trial [ ] may carry its initial burden of production by either of two methods. The moving party may produce evidence negating an essential element of the nonmoving party's case, or, after suitable discovery, the moving party may show that the nonmoving party does not have enough evidence of an essential element of its claim or defense to carry its ultimate burden of persuasion at trial." *Nissan Fire & Marine Ins. Co., Ltd., v. Fritz Companies*, 210 F.3d 1099, 1102 (9th Cir. 2000). If the movant meets its burden, the nonmoving party must come forward with specific facts demonstrating a genuine factual issue for trial. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

If the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial, "the moving party is entitled to a judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). In opposing summary judgment, the nonmoving party may not rest on his pleadings. He "must produce at least some 'significant probative evidence tending to support the complaint.'" *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987) (quoting *First Nat'l Bank v. Cities Serv. Co.*, 391 U.S. 253, 290 (1968)).

The Court does not make credibility determinations with respect to evidence offered, and is required to draw all inferences in the light most favorable to the non-moving party. *See T.W. Elec.*,

809 F.2d at 630-31 (citing *Matsushita*, 475 U.S. at 587). Summary judgment is therefore not appropriate "where contradictory inferences may reasonably be drawn from undisputed evidentiary facts . . .." *Hollingsworth Solderless Terminal Co. v. Turley*, 622 F.2d 1324, 1335 (9th Cir. 1980).

ANALYSIS

The goal of contract interpretation is to give effect to the parties' mutual intent. Cal. Civ. Code § 1636; *Bank of the West v. Superior Court*, 2 Cal. 4th 1254, 1264 (1992). "It is the outward expression of the agreement, rather than a party's unexpressed intention, which the court will enforce." *Winet v. Price*, 4 Cal. App. 4th 1159, 1166 (1999). Under California law, the threshold question in interpreting a contract or its provisions is "whether the contested terms are ambiguous." *City of Santa Clara v. Watkins*, 984 F.2d 1008, 1012 (9th Cir. 1993). Whether a written contract is ambiguous is a question of law to be decided by the court. *Brobeck, Phleger & Harrison v. Telex Corp*., 602 F.2d 866, 871 (9th Cir. 1979).

In assessing whether a contract is ambiguous, the district court "must receive relevant extrinsic evidence that can prove a meaning to which the language of the contract is 'reasonably susceptible.'" *Id.* (quoting *Pacific Gas and Electric Co. v. G.W. Thomas Drayage Co.*, 69 Cal. 2d 33, 37 (1968). "If the court finds after considering this preliminary evidence that the language of the contract is not reasonably susceptible of interpretation and is unambiguous, extrinsic evidence cannot be received for the purpose of varying the terms of the contract." *Id*.

Summary judgment is proper only if the contract or the provision in question is unambiguous. *Id*. If an ambiguity exists, the Court cannot resolve the dispute on summary judgment. *National Union Fire Ins. Co. v. Argonaut Ins. Co.*, 701 F.2d 95, 97 (9th Cir. 1983). "The rationale for this proposition is simple: ambiguity in a contract raises a question of intent, which is a fact question precluding summary judgment." *Id.*

Here, Plaintiff asserts that Defendants' breached the terms of the Commission Agreement in three separate ways: 1) the Landlord's action of finding and entering into replacement leases for the Subleased Premises directly with third party tenants demonstrates that the Landlord had "recaptured" the subject premises within the meaning of the Commission Agreement; 2) Defendants rejected in advance all potential subleases, thereby effectively taking the property off the market

before the expiration of the listing term; and 3) the Landlord initiated the process of terminating the lease for the Sublease Premises within 90 days of the expiration of the Commission Agreement. The Court will address each issue in turn.

A. "Recapture" of the Sublease Premises

Paragraph 6 of the Subleasing Agreement, as amended, states, in relevant portion, that "Sublessor agrees to pay Broker a commission . . . (iii) if, during the 90 day period following the expiration or sooner termination of this Agreement, the Master Landlord initiates the process to terminate the lease for the Sublease Premises, or subleases from Sublessor or *otherwise recaptures the Sublease Premises*." (emphasis added).

Plaintiff contends that the phrase "otherwise recaptures" was intended as a broad catchall provision.[1] Plaintiff asserts that by reaching an understanding with EGN to lease the Sublease Premises directly to third parties, the Landlord "recaptured" the premises within the meaning of the Subleasing Agreement. Plaintiff further asserts that, at worst, the phrase "otherwise recaptures" is ambiguous. Defendants respond that in order for the Landlord to have "recaptured" the Sublease Premises, he must have retaken possession of the property.

Having reviewed the evidence in the record concerning the meaning of the term "recaptures," the Court finds that no triable issue of fact exists with respect to the proper interpretation of that term. As an initial matter, the Court notes that cases have construed "recapture" to mean the landlord must retake possession of the property.[2] *See Three Sixty Five Club v. Shostak*, 104 Cal. App. 2d 735, 737-38 (1951) ("recapture" of second floor synonomous with possession). Here, it is undisputed that the Landlord did not take any action to take away or limit EGN's exclusive possession of the premises prior to December 29, 2003. Furthermore, the Court notes that Plaintiff

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[1]To the extent that Plaintiff urges the Court to read "initiates the process" to modify the phrase "otherwise recaptures," the Court is unpersuaded. The Court finds it significant that the contract language uses the disjunctive when referring to "initiates the process to terminate the lease for the Sublease Premises, or subleases from Sublessor *or otherwise recaptures* the Sublease Premises." This disjunctive language allows the Court to consider whether the Master Landlord: 1) initiates the process to terminate the lease for the Sublease Premises, 2) subleases from Sublessor, or 3) otherwise recaptures the Sublease Premises.

[2]Because the term "recapture" tends to have a generally accepted meaning, the Court finds that it is not ambiguous on its face.

has offered no evidence to support the interpretation it urges -- that the Landlord's ability to sublease directly to tenants somehow equates with recapture of the leased premises.

In *National Union*, the court stated that "[the plaintiff cannot rely on the mere possibility of a factual dispute as to intent to avert summary judgment. Nor can it expect the district court to draw inferences favorable to it when they are wholly unsupported." 701 F.2d at 96. As in *National Union*, Plaintiff has offered no support for its interpretation of "recapture," and hence has failed to create a genuine issue of material fact as to the proper interpretation of the term.

B. Rejection of All Potential Subleases

Under the terms of the Commission Agreement, EGN granted Plaintiff "the exclusive right to procure for Sublessor a sublease/subleases" during the term of the listing, which was eventually extended to September 30, 2003. On August 26, 2003, Plaintiff alleges that a representative of EGN informed Plaintiff to stop pursuing any future subleasing deals. Plaintiff contends that by effectively taking the property "off the market," Defendants violated their promise to consider the sublease proposals presented by Plaintiff.

Defendants respond that the express terms of the Subleasing Agreement granted EGN the unconditional right to reject any sublease that Plaintiff proposed and to terminate any negotiations for any proposed sublease. Paragraph 14 of the Subleasing Agreement states as follows:

> Nothing contained in this Agreement shall be interpreted as obligating Sublessor to accept or enter into a sublease or assignment or to prevent Sublessor from accepting or entering into any sublease or assignment with any prospective Subtenant or assignee, whether or not such sublease or assignment is proposed by Broker. Broker acknowledges that Sublessor shall have the unqualified right, in its sole discretion, to terminate the negotiations with any prospective Subtenant or assignee at any time and to refuse to enter into any sublease or with any prospective subtenant.

Based upon this contract language, Defendants contend that they had every right to refuse to consider sublease proposals offered by Plaintiff.

Upon considering the relevant contract language, the Court finds that Defendants had the unqualified right to refuse to enter into sublease proposals offered by Plaintiff. While Plaintiff urges the Court to make a distinction between "entering into" and "considering" a proposed sublease agreement, the Court is unpersuaded. The Court finds that the contract language allowing Defendants the right "to refuse to enter into any sublease" is broad enough to allow Defendants to

refuse to consider any and all sublease agreements proposed by Plaintiff. Accordingly, the Court finds that the challenged contract language is unambiguous, and concludes that Plaintiff has failed to raise a genuine issue of material fact regarding its "off the market" theory.[3]

C. Initiates the Process

Paragraph 6 of the Subleasing Agreement, as amended, states, in relevant portion, that "Sublessor agrees to pay Broker a commission . . . (iii) if, during the 90 day period following the expiration or sooner termination of this Agreement, the Master Landlord *initiates the process to terminate the lease* for the Sublease Premises . . . ." (emphasis added). Plaintiff contends that the Landlord "initiated the process" to terminate or otherwise recapture the premises when it initiated negotiations with EGN following EGN's default under the lease. Defendants argue that in order to "initiate the process" to terminate the lease, the Landlord must have taken affirmative steps to terminate the Master Lease, such as serving an express termination notice or filing a legal action to terminate.

The Court finds that Defendants' reading of "initiates the process" is overly narrow and restrictive. To be certain, the phrase "initiates the process to terminate the lease" is reasonably susceptible to multiple interpretations. While the Court agrees with Defendants that the filing an unlawful detainer lawsuit could have "initiated the process to terminate the lease," the Court is not persuaded that such legal action was the only means available to satisfy the contractual language. It is reasonable to conclude that simple negotiations between the Landlord and EGN regarding lease

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[3]Plaintiff also contends that Defendants violated the covenant of good faith and fair dealing by rejecting in advance all potential subleases. Plaintiff asserts that the level of discretion reserved by Defendants in the Subleasing Agreement ultimately deemed the contract illusory. The Court disagrees. It is well settled that where a discretionary right in a contract in unambiguous, a party may not invoke the implied covenant of good faith and fair dealing. *See Carma Developers, Inc. v. Marathon Development California, Inc*., 2 Cal. 4th 342, 374 (1992) ("As to acts and conduct authorized by the express provisions of the contract, no covenant of good faith and fair dealing can be implied which forbids such acts and conduct. If parties were given the right to do what they did by the express provisions of the contract there can be no breach.") Furthermore, the Court finds that Defendants' provided adequate consideration for the contract, including designating Plaintiff as the exclusive leasing agent for the Sublease Premises.

Moreover, because the Court finds that no issues of material fact exist regarding the "off the market" theory, the Court need not decide whether Plaintiff has failed to demonstrate contractual damages under this theory.

termination could also satisfy the "initiation" process.[4] Given that an ambiguity exists in this contract language, the Court cannot resolve this dispute at the summary judgment stage. Accordingly, Defendants' motion for summary judgment on the contract claim is **DENIED**.[5]

CONCLUSION

For the reasons stated above, the Court **DENIES** Defendants' motion for summary judgment.

IT IS SO ORDERED.

Dated: September _19_, 2005

MARTIN J. JENKINS
UNITED STATES DISTRICT JUDGE

[4]According to Plaintiff, these negotiations included discussions concerning the recovery of the Subject Premises and the leasing of the Subject Premises by the Landlord directly to a third party tenant. (Declaration of James Chesler ("Chesler Decl.") at ¶¶ 12 and 13). However, the Chesler Declaration does not explicitly state that the negotiations concerned "the recovery of the Subject Premises." Rather, the Chesler Declaration states that the negotiations concerned the issue of whether the Landlord could lease the EGN property directly to third party tenants. However, the Court is satisfied that the Chesler Declaration raises an inference that the Landlord "initiated the process" to terminate the lease.

[5]Because the factual basis of Plaintiff's common count claim is the same as the contract claim, the Court also **DENIES** Defendants' motion for partial summary judgment on the common count claim.